Supreme Court of the United States

No. 788

HARRY BRIDGES

Petitioner

against

I. F. WIXON, as District Director Immigration and Naturalization Service, Department of Justice

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMERICAN COMMITTEE FOR PROTECTION OF FOREIGN BORN *AMICUS CURIAE*

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Statement

The rights of three and a half million aliens who have not yet become citizens are affected by this case. The results arrived at, the safeguards ignored and the contentions of the government in its memorandum in the certiorari proceedings obscure the principles underlying the relation of our government to its friendly resident aliens. We suggest that because of the decision below, a re-statement of those principles and a repudiation of certain assumptions upon which the decision rests are necessary.

The petitioner entered this country lawfully and has lived here for twenty-five years. A vigorous and dynamic labor leader, he has been the storm center of industrial

controversy, has made enemies and has earned the hostility of powerful interests (*Bridges* v. *Wixon*, 144 F. [2d] 927, 939). He has been ordered deported not because of any of his acts as a labor leader or because he has committed any offense. It is not charged that he has advocated the forcible overthrow of the government of the United States. Nevertheless, various legislative and administrative steps have been taken which have finally resulted in the order for his deportation. That order is based upon a finding of past membership in or affiliation with organizations found to advocate the violent overthrow of the government.

One hundred and fifty years ago the Alien and Sedition Acts were passed. The Alien Act permitted the President to arrest or deport any alien whom he should "judge dangerous to the peace and safety of the United States."[1]

The statutes under which petitioner has been ordered deported did not, as did the Alien Act, give the President power to deport petitioner as an undesirable alien. Though a bill was actually passed by the House of Representatives directing the deportation of the petitioner, naming him by name, this bill died in the Senate when the then Attorney General advised against its passage, stating that it would be the first time since the Alien and Sedition Acts that "any law would provide for a deportation without a hearing or without, indeed, the slightest pretense towards giving the accused what our nation has long known as 'due process of law'."[2] Thereafter, there was an amendment to the general deportation law, with the avowed purpose, according to its sponsor[3] of encompassing the deportation of the petitioner. Petitioner

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[1] The Alien Act (Act of June 25, 1798: 1 U. S. Stats. at L. Chapter LVII) expired according to its terms in two years.

[2] S. Rep. No. 2031, 76th Cong., 3rd Sess., p. 9.

[3] 86 Cong. Rec. 9031.

charges that to procure his deportation, various safeguards designed for the protection of individuals against arbitrary governmental action have been disregarded and that his deportation has been ordered in violation of his constitutional rights and of the dictates of fair play embodied in the American notions of due process.

The majority judges in the court below felt uneasy about the matter of proof as to the alien's membership in or affiliation with the proscribed organizations. The record did not leave with them the "pleasurable satisfaction that, barring a very slight possibility of error, the truth has been revealed" (144 F. [2d] 927, 938). They, however, felt bound by the decision of the Attorney General which reversed the decision of the Board of Immigration Appeals. The dissenting judges thought that in the light of the quality of the evidence "it would seem a more forthright procedure to do what was proposed in the first place, deport him (petitioner) by legislative resolution" (144 F. [2d] at p. 943).

No one will dispute that this country has the right and that Congress is empowered to protect the United States against undesirable aliens by deporting them. The exercise of this power is, however, subject to definite limits imposed by Congress in its passage of legislation and upon the officials who are to enforce the statutes. To protect the rights of aliens we ask the Court to sustain the following contentions.

FIRST

The guarantees of freedom of speech and of the press are extended to resident aliens as well as to citizens.

The government, as we read their argument (Certiorari Memorandum, 33-35) implies that resident aliens

are not protected by constitutional guarantees of freedom of speech and of the press,—that the sovereign power of Congress to enact deportation laws is not limited by the First Amendment.

The First Amendment reads:

> "Congress shall make no law * * * abridging the freedom of speech or of the press * * *."

The limitations of the Congressional power under this amendment are now clear.

> "It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish." *Board of Education* v. *Barnette*, 319 U. S. 624, 633.

This court, in stating where the individual's freedom ends and the state's power begins, said that any attempt to restrict the freedoms secured by the First Amendment

> "must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation." *Thomas* v. *Collins*, 65 S. Ct. 315, 322-3.

These, then, are the limits that Congress may not transcend.

The Amendment makes no distinction between citizens and aliens and the purposes of the Amendment preclude any distinction so far as the holding and expression of opinion by resident aliens is concerned.

The guarantees of free speech are designed to protect the community. It is deemed "essential to free government" "that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education". "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evils averted by the courageous exercise of the right of free discussion". *Thornhill* v. *Alabama*, 310 U. S. 88, 95.

The experience of our country and the contrast of our institutions with those of totalitarian countries emphasize the wisdom of seeing that the right of Americans to hear and read all points of view are not interfered with.*

No one would, we think, argue that a resident alien may be restrained from expressing his views freely and without fear of deportation on the binomial theorem, the midnight curfew, the doctrine of transubstantiation or the efficacy of vitamins. But he is not limited to these matters. Our institutions protect him in the expression of his opinions as to "political and economic" truths, protect him in the "free and fearless" expression of these views without limit up to the point where his words become in effect acts,—where they become the immediate incentives to actions of the kind that the state is empowered to prevent.

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* Nearly a century ago John Stuart Mill emphasized that it was for the benefit of the persons to whom the views were communicated that freedom of expression be not interfered with.

"But the peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer reception and livelier impression of truth produced by its collision with error." John Stuart Mill: "On Liberty" (Everyman Ed. p. 79).

This must be true unless there is some express or implied provision in the Constitution distinguishing between citizens and resident aliens. Express difference there is none. Nor can any such distinction be read into the Constitution. For the education of the nation may be advanced as well by the statements of non-citizens as of citizens. Such distinguished aliens as Thomas Mann, Count Sforza and Pierre Cot have resided in our country as non-citizens. Their views on American trends as interpreted by what they had witnessed in their native lands—Germany, Italy and France,—would be at least as potent in averting noxious doctrines as the views of any native American.[5]

But "free and fearless reasoning and communication of ideas", "courageous exercise of the right of free discussion" is withdrawn from aliens if they know that the penalty for expressing or having at any time in the past expressed unpopular views may be deportation. If there were such a threat, the possibility of free discussion would be undermined. The speaker would be compelled either to "hedge and trim" (*Thomas* v. *Collins*, 65 S. Ct. 315, 325); or to keep silent. The only other choice remaining to the speaker would be the baneful one of expressing his views covertly with the danger of creating resentment and evasions that forcing views underground engenders.

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[5] No recent book has perhaps caused more discussion concerning the advantages and limitations of planning and regimentation than "The Road to Serfdom" by the Austrian economist, Hayek.

"* * * all attempts to influence (the mind) by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness. * * *" (Language of the preamble to the Virginia Statute for Religious Freedom quoted in *Board of Education* v. *Barnette*, 319 U. S. at p. 646).

SECOND

An alien lawfully residing in the United States cannot be made deportable for associating with other persons for legitimate ends.

Where a resident alien may not be penalized directly for his own expressions or conduct he may not be penalized indirectly for associating with others when the association is for unobjectionable ends. Loose terms, such as "affiliation" and "association", will not be permitted to obscure this principle.

In the series of attempts to deport an individual unpopular with certain groups, fundamental personal rights are in danger of being slurred over. The dissenting judges assert that the Attorney General "in arriving at his finding of affiliation" "appears to have relied indiscriminately on every circumstance which might be thought to spell sympathy or to be indicative of an association however temporary in pursuit of ends however legitimate" (144 F. [2d] at 941).

If this statement is borne out by the record, then we submit that the construction of "affiliation" as used in the statute is an improper construction or else it results in the violation of constitutional rights.

A labor leader does nothing to render himself deportable by making common cause with a radical union in a campaign to procure housing for workers or in soliciting their help in winning a strike.[7] Nor would he render him-

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[7] As the majority of the court below said (144 F. [2d] at 938), speaking of the longshoremen's strike and the association of the petitioner with the Marine Workers Industrial Union during the period of that strike:

> "It may be stated arguendo, that appellant in his management of that strike, was attacking most vicious and inhumane practices toward longshoremen and that he was justified in accepting help from any quarter."

self deportable by contributing to a fund for a day nursery for the infant children of the union members.[8]

An alien would not become undesirable and deportable because of such tenuous contacts with a radical union even though the union were proscribed by statute. For this would be an unreasonable interpretation of the word affiliation.[9] If, however, the statute made it clear that such conduct was intended to afford a basis for deportation, then we submit the statute would be violative of the Fifth Amendment in that there would be no rational relation between the contacts that are penalized and the evil that is designed to be curbed. *Tot* v. *U. S.*, 319 U. S. 463; *Cummings* v. *Missouri*, 4 Wall. 277, 319-20; *De Jonge* v. *Oregon*, 299 U. S. 353.

THIRD

A resident alien is denied due process unless he is given a fair hearing before the findings are made ordering his deportation. It is not a fair hearing for an administrative official to reverse a decision cancelling a warrant of deportation without giving the alien an opportunity to know the specific contentions of the Government and to address arguments thereto.

We assume the following propositions to be settled:

That depriving a person who has resided for twenty-five years in the United States of the right to continue

[8] How far the statute went in its attempt to reach anyone who might have any contact with one of the proscribed organizations appears from the section of the statute where it is provided that "the giving, loaning or promising of money or of anything of value to any organization, association, society or group, of the character above described, shall constitute affiliation therewith" (8 U. S. C. Sec. 137 [e]).

[9] Compare on this point the language of the dissenting opinion, 144 F. (2d) at page 941 and especially the discussion there of *Kettunen* v. *Reimer*, 79 F. (2d) 315.

his residence is a deprivation of liberty within the meaning of the Fifth Amendment (*Ng Fung Ho* v. *White*, 259 U. S. 276, 284)[10] and that due process in a quasi-judicial administrative proceeding requires that there be an opportunity to meet contentions before there is a ruling adversely affecting the rights of an individual (*Morgan* v. *United States*, 304 U. S. 1, 18).

The deportation statute involved in this case provides that if an alien is a member of or affiliated with certain proscribed classes he shall "upon the warrant of the Attorney General be taken into custody and deported * * *" (8 U. S. C., § 137). Congress has not implemented the statute. But the Immigration Service has promulgated regulations (8 Code of Federal Regulations, especially Parts 90 and 150) which up to a certain point assure an alien an opportunity to meet charges before the issuance of a final order against him."[11]

Under these regulations there is a Presiding Inspector who conducts hearings and proposes findings (§ 150.7). His proposed findings are subject to review by the Board of Immigration Appeals, the body which is empowered to issue orders of deportation, to cancel warrants of arrest and to exercise the discretion conferred by law upon the Attorney General appropriate to the disposition of deportation proceedings (§§ 90.2, 90.3). Provisions for being apprized of the proposed adverse findings of the Presiding Inspector (§ 150. 7[d]). or—where his deci-

[10] "Deportation, at least of resident aliens, is, in the terms of human consequences, one of the most serious forms of the assertion of governmental power—far more serious than mere denial of entry." (Report of Secretary of Labor's Committee on Administrative Procedure, May 17, 1940, p. 61.)

[11] "The failure of Congress to deal with the problem of how that power [to deport resident aliens] should be exercised imposes upon the Department of Labor a special obligation to erect its own safeguards." (Report of the Secretary of Labor's Committee on Administrative Procedure, May 17, 1940, p. 61.)

sion is not adverse to the alien—to the proposed adverse findings of the Board of Immigration Appeals and of a hearing before these findings can be operative is provided for fully by the regulations (§ 90.11).

There is a loophole in these regulations. In certain special cases the Attorney General may review the decision of the Board of Immigration Appeals. There are no provisions in the regulations safeguarding the rights of the alien if the Attorney General "after consideration of the record believes that an order less favorable to the alien than that proposed" by the Board of Immigration Appeals should be entered.[12]

Thus, where there is a decision of the expert Board of Immigration Appeals[13] holding that an alien is not deportable the Attorney General may, so far as the regulations are concerned, declare the alien deportable without giving him a chance to be heard. We contend that this hiatus in the regulations does not justify the Attorney General, in denying the alien the right to a hearing before findings are altered to his disadvantage. It is true that the Attorney General has the record before him of what the Presiding Inspector has done and what the Board of Immigration Appeals has done but this *ex parte* proceeding does not protect the alien against new arguments being used against him or decisions being made on points that the expert Board of Immigration Appeals has not considered.

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[12] The quoted language is from § 90.11 of the regulations which prescribes a full hearing before the Board of Immigration Appeals when that Board proposes from an examination of the record to issue an order more harmful to the alien than that recommended by the Presiding Inspector.

[13] The Board of Immigration Appeals is the successor of a body that existed under the Department of Labor. When this phase of the Immigration Service was transferred to the Department of Justice under Reorganization Plan V, adopted under the Reorganization Act of 1939 (5 U. S. C. A. § 133t, fn.), the Board instead of being an advisory board became a deciding board (Regulations § 90.3).

That he who determines must hear is the principle required by our notions of due process in administrative proceedings. In the last analysis this means that a person whose right of residence will be destroyed by the decision of an administrative official at any level must have a reasonable opportunity to know the contentions that will be made against him and to meet them before such a decision is made.[14]

The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps (*Morgan* v. *United States*, 304 U. S. at p. 20). Unless these wholesome requirements are lived up to there are the dangers that always exist in *ex parte* proceedings. These dangers are accentuated where the record is a long one.

How grave these dangers are is illustrated by what happened in this case. The expert body decided that "the case relied upon by the Service and accepted by the Presiding Inspector is not sustained" (R. 376). The Board rejected the Presiding Inspector's proposed findings as to membership in the Communist Party. The O'Neil statements were rejected by the Board of Immigration Appeals as having been received in evidence in violation of the rules of the Immigration Service (R. 449-50).

The Attorney General held that the statements were admissible enunciating—we understand for the first time—

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[14] "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command." (*Morgan* v. *U. S.*, 304 U. S. at pp. 18-9.)

The Secretary of Labor's Committee interprets the *Morgan* case as holding it to be "a denial of due process of law for a remote administrative official to render a decision without giving fresh notice of the specific contentions of the government and a chance to address argument thereto." (Secretary of Labor's Committee on Administrative Procedure, Report of May 17, 1940, p. 90.)

the theory that the alien had "waived" objection to the evidence (R.95-6). Whether it is error to decide that objections to the evidence have been waived when the deciding body has sustained the objection and rejected the dence is outside our discussion. The fact is that evidence was received by the Attorney General after it had been rejected by his Board without an opportunity given to the alien to show that there was no waiver.

After the Attorney General had made the decision there was no real possibility for reviewing the adequacy of the evidence. For the majority of the judges in the habeas corpus proceedings held that they were precluded from examining into the sufficiency of the evidence (144 F. [2d] at 938). Whether in the light of the paucity of the evidence (144 F. [2d] at 940) the courts below would have held that the "borderline of inadequacy" had been passed had the O'Neil evidence been removed from the case is a matter of surmise (See the discussion in the dissenting opinion, 144 F. [2d] at 943).

Beside the question of the admissibility and effect of this evidence which the dissenting judges deemed crucial, the failure of the Attorney General to grant a hearing had another result. The regulations envisage the making of decisions in deportation matters by the Board of Immigration Appeals. But that Board never passed upon the question whether the aims and character of the Communist Party and Marine Workers Industrial Union were such as to include them in the groups proscribed by the statute. The Board having decided that the alien was neither a member of the Communist Party or affiliated with the Party or the Marine Workers Industrial Union never went into these issues. The Attorney General, in reversing the Board as to membership and affiliation, did not send the case back to the Board to have it pass upon these issues. He simply accepted the proposed findings of the Presiding Inspector without giving the alien a chance to argue these

questions before they were decided adversely by either the Board or the Attorney General, the authorities vested with final deciding authority.

These significant departures by the Attorney General cannot be viewed as other than a failure to give a fair hearing and accordingly a denial of due process.

Conclusion

The errors—dangerous to alien residents—in the decision below require that the decision be reversed.

Respectfully submitted,

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